UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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When the War Is At Home, Who Is On the Front Lines?

Judges and the War On Terrorism

Judges are on the front lines in the war against terror, yet numerous judgeships remain vacant. Yesterday marked the beginning of the 13th month that eight of President Bush's exceptional nominees have been pending – without even a hearing.

The United States is at war. On September 11, 2001, the enemy landed a blow that was more deadly than any other *ever* upon American soil . . . and the casualties were all civilians or other noncombatants. The number of the dead was unprecedented, but there are numerous other differences between this war and previous wars. History may show that none is more important than the role of judges.

In foreign wars, American judges have been largely irrelevant. But in a war being conducted on our own soil, under the umbrella of the Constitution and laws of the United States, against covert adversaries who would use American liberties to enable them to build, position, and detonate a chemical, biological, nuclear, or radiological bomb that would kill and disfigure thousands of Americans and disable the country – judges will play an essential, perhaps a conclusive, role.

Judges are not omniscient. They make mistakes. The judicial system is not perfect; indeed, it contains numerous flaws, some of which we knowingly accept as the price of "a more perfect Union." But just how much liberality and forbearance can be tolerated where the stakes are a nuclear firestorm on our own soil, or a wholesale, indiscriminate anthrax attack against our own people, or some other apocalyptic terror? Federal judges may be the ultimate arbiters of that question – not the President, not the Congress, but Federal judges. We wonder if the Framers anticipated that judges would wield such power. We are confident that the Framers never foresaw today's weapons of mass destruction.

Some questions arising from the attacks of September 11 have reached the Federal courts already. Below, we summarize the answers that are being given. These decisions, for good or ill, affect the war – and the lives and liberties for which the war is being waged:

Detainees at Guantanamo Are Not Entitled to* Habeas *Relief. U.S. District Judge A. Howard Matz, who was nominated by President Clinton in October 1997, and confirmed by the Senate eight months later, held a few months ago that a coalition of clergy, lawyers, and professors did not have standing to assert legal claims on behalf of the detainees who were captured in Afghanistan and are now being held by the United States at Guantanamo Naval Base, Cuba. The district court also said that

neither it, nor any Federal court, had jurisdiction over the case. The court deferred to the political branches of government and to the military authorities, which was not so unusual since the detainees are not being held on American soil. The court said:

> "[T]his Court is not holding that these prisoners have no rights which the military authorities are bound to respect. The United States, by the [1949] Geneva Convention . . . concluded an agreement upon the treatment to be accorded to captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. . . ." *Coalition of Clergy v. Bush*, 2002 U.S. Dist. LEXIS 2748, at *41 (D. C. Calif., Feb. 21, 2002), on appeal to the 9th Circuit.

Material Witnesses Cannot Be Imprisoned To Guarantee Testimony To a Grand Jury. U.S. District Judge Shira A. Scheindlin, who was nominated by President Clinton in July 1994, and confirmed by the Senate two months later, held just a few weeks ago that the Federal "material witness statute," 18 U.S.C. §3144, does not authorize the government to imprison a person to guarantee that he will be available to testify before a grand jury that is conducting a criminal investigation into the terrorist attacks of September 11. The defendant, Osama Awadallah, had been detained in prison because he had met two of the September terrorists, and the government wanted his testimony. After he testified to the grand jury, the government charged him with perjury. Judge Scheindlin said his detention was illegal, and that the evidence of his testimony must be suppressed because of that unlawful detention. The court said:

> "[S]ince 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation. A proper respect for the laws that Congress does enact – as well as the inalienable right to liberty – prohibits this Court from rewriting the law, no matter how exigent the circumstances." *United States v. Awadallah*, 2002 WL 755793, at *23 (D. S. N.Y., April 30, 2002), notice of appeal filed.

Alien Removal Proceedings Cannot Be Closed. U.S. District Judge Nancy G. Edmunds, who was nominated by President Bush in September 1991, and confirmed by the Senate five months later, held in early April that members of the press and the public had been denied their First Amendment rights when they were excluded from the removal proceedings for an alien, Rabih Haddad, who had overstayed his six-month tourist visa by some four years. The government was trying to enforce and defend a post-9/11 directive that required immigration proceedings to be closed in certain "special interest" cases.

Closure was necessary, the government argued, because, among other things, disclosure of sensitive information "could lead to public identification of individuals associated with" the alien, and "other investigative sources, potential witnesses, and terrorist organizations." Additionally, "releasing the names of the detainees would reveal the direction and progress of the investigation" and "could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence." Rejecting the government's arguments, the court held that "blanket closure" of removal proceedings is unconstitutional. *Detroit Free Press v. Ashcroft*, 2002 U.S. Dist. LEXIS 5839 (D. E. Mich., April 3, 2002), on appeal to the 6th Circuit.

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